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Supreme Court, U.S.
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No. _____

In The
SUPREME COURT OF THE UNITED STATES

STEPHEN DAVID,
Petitioner

V.

TIMOTHY HALL,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether 28 U.S.C. § 2244(d)(1)'s one-year period of limitation for habeas corpus petitions contains a statutory exception for cases where the prisoner can make a colorable showing of actual innocence.

2. If 28 U.S.C. § 2244(d)(1) does not contain an actual-innocence exception, whether the one-year period of limitation violates the Suspension Clause of the United States Constitution when applied to cases where the prisoner can make a colorable showing of actual innocence.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (App., *infra*, A2-11) is reported at 318 F.3d 343. The opinion of the United States District Court for the District of Massachusetts (App., *infra*, A12-16) is unreported. The report and recommendation of the United States Magistrate Judge (App., infra, A17-30) is unreported.

JURISDICTION

The court of appeals entered its judgment on February 5, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

THE STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

28 U.S.C. § 2244(d)(1) provides, in relevant part, that "[a] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from. . . the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review."

Article I, Section 9 of the United States Constitution provides, in relevant part, that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

STATEMENT OF THE CASE

On December 20, 1990, a grand jury sitting in Norfolk County, Massachusetts, returned three indictments against the petitioner alleging murder, kidnapping, and armed robbery. On April 13, 1992, he offered to change his plea to so much of the murder indictment that alleged murder in the second degree. The Honorable Judge Meyer conducted a colloquy with the petitioner and accepted his guilty plea.

On August 30, 1994, the petitioner filed a *pro se* motion for new trial and asked for court appointed counsel. On November 2, 1994, Stephen Neyman, Esq., entered his

appearance as appointed counsel (petitioner's motion for appointed counsel having been allowed). Appointed counsel filed, on July 17, 1995, a replacement motion for new trial, alleging (1) that the plea was not voluntary because of pressure from the petitioner's parents and alleging (2) newly discovered evidence based on the affidavit of a codefendant.

Because Judge Meyer had retired, the motion was reassigned to the Honorable Judge Barrett, who, without holding an evidentiary hearing, issued a Memorandum and Order denying the petitioner's motion. The petitioner duly perfected his appeal to the Appeals Court of Massachusetts. On November 7, 1997, the Appeals Court issued a Memorandum and Order, pursuant to Rule 1:28, affirming the judgment of the Superior Court. The Appeals Court noted that a motion may be decided on the basis of affidavits without a hearing if no issue is raised by the motion or affidavits. In due course, the Massachusetts Supreme Judicial Court denied the petitioner's application for further appellate review.

On May 5, 1998, the petitioner filed, with new counsel, his second motion for new trial. This motion also claimed that the plea was not voluntary; the motion was based on the plea judge's erroneous definition of malice, and ineffective assistance of counsel in failing to earlier raise this issue, which was apparent on the record. The Commonwealth filed a response after being ordered to do so. On October 5, 1998, the Honorable Judge Dortch-O'Kara issued a Memorandum and Order denying the petitioner's motion. Judge Dortch-O'Kara's decision was grounded on her view that the plea judge had correctly defined malice. The petitioner seasonably perfected this appeal to the Appeals Court of Massachusetts. On April 3, 2000, the Appeals Court affirmed the denial of the second motion for new trial "for substantially the reasons set forth in the Commonwealth's brief at 10-25" (the entire argument section of said brief). In its brief, the Commonwealth argued that the plea met constitutional standards and that the petitioner had waived his argument by not asserting it in his first motion for new trial. The Commonwealth did not address the petitioner's ineffective assistance of counsel claim on the theory that such a claim was

more difficult to prove than a miscarriage of justice claim. The Commonwealth asserted that the petitioner did not meet the miscarriage standard, since the colloquy was complete and the crime was heinous. Further appellate review was denied by the Massachusetts Supreme Judicial Court on June 29, 2000.

The petitioner thereafter filed his habeas corpus petition in the United States District Court on March 29, 2001. The respondent then moved to dismiss the petition on the grounds that it was not timely filed. The case was referred to Magistrate Judge Cohen, who recommended that the petition be dismissed. The district court followed suit, issuing a Memorandum and Order dismissing the petition on August 13, 2001. The district court also denied a certificate of appealability, but the First Circuit Court of Appeals later granted a certificate. On February 5, 2003, the First Circuit Court of Appeals affirmed the district court's dismissal of the petition. In affirming the dismissal, the court of appeals stated that "the statutory one-year limit on filing initial habeas petitions is not mitigated by any statutory exception for actual innocence." App., *infra*, A10.

A. Facts

1. The Relevant Dates

The petitioner's first motion for new trial was filed in the state Superior Court before the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The Massachusetts Supreme Judicial Court denied the application for further appellate review concerning the denial of that motion on December 29, 1997.

The petitioner filed his second motion for new trial on May 5, 1998 (127 days later). The Supreme Judicial Court denied his application for further appellate review concerning the denial of the second motion on June 29, 2000. The petitioner filed his habeas corpus petition in the United States District Court on March 29, 2001 (272 days later).

2. Attorney Error

The only evidence before the district court was counsel's affidavit, which indicated that he could have filed the petition months earlier but did not because he believed he was filing in a

timely manner.

3. Factual Innocence

The "evidence" before the state judge who accepted the defendant's guilty plea was the prosecutor's statement of the facts.

Abraham Champlain and his friend Scott Royal were living in a tent in a heavily wooded area of Faxon Park in Quincy, Massachusetts. Tr. 4/13/92:14. On October 1, 1990, Champlain withdrew his V.A. check; the petitioner, his girlfriend Cathy McAulife, Stephen Rose, and his girlfriend Marianne Labie, joined Champlain and Royal, drinking into the early evening. Tr. 4/13/92:14-15. Champlain and Royal left to get more alcohol and returned separately after an argument. Tr. 4/13/92:15. Rose announced that a kangaroo court would be held and Champlain was sentenced to hang. Tr. 4/13/92:15. Rose, Royal, and the petitioner hung Champlain upside down by the ankles from a tree; the petitioner threw several rocks at him. Tr. 4/13/92:16. Rose cut Champlain down. Tr. 4/13/92:16.

The next morning, the petitioner and Rose went to buy more alcohol and returned with vodka and a case of beer. Tr. 4/13/92:16. The group began drinking again. Tr. 4/13/92:16.

After threats by Rose, Champlain was made to strip and put on red pajamas. Tr. 4/13/92:16-17. The petitioner and the women poured things over Champlain's head and joked that he looked like a pizza. Tr. 4/13/92:17.

The petitioner and Rose dragged Champlain to a second tree and hung him upside down by his ankles again. Tr. 14/13/92:17. The petitioner and Rose then urinated on Champlain. Tr. 4/13/92:17. After cutting him down, the three men then dragged Champlain to the top of an adjacent cliff. Tr. 4/13/92:17. The petitioner and others rolled him off the cliff and he became stuck on a small tree part way down. Tr. 4/13/92:18.

The petitioner dragged Champlain to the bottom and then tied him to a third tree with his feet at the ground. Tr. 4/13/92:18. The petitioner then struck Champlain with a tree branch ten to fifteen times in the upper torso. Tr. 4/13/92:18. Rose cut Champlain down and left a blanket. Tr. 4/13/92: 18.

The prosecutor said that Dr. Boschetti would have testified that the cause of death was multiple blunt trauma but that the injuries themselves were probably not fatal. Tr. 4/13/92:20. The precise mechanism of death could have been one of a number of things, including exposure to the elements. Tr. 4/13/92:20.

After the prosecutor's recitation of the facts, the plea judge asked if the facts were correct and if the petitioner wanted to add or subtract from those facts. Tr. 4/13/92:23. The petitioner responded that he was substantially drunk at the time and had no intentions of killing the decedent. Tr. 4/13/92:23.

A review of this proffer indicates the main allegations against Mr. David. First, that he participated in hanging the victim by his ankles from a tree and threw rocks at him before the victim was cut down by Stephen Rose. Second, that he participated in hanging the victim from a second tree; and, then, after he was cut down, he participated in dragging the victim to the top of an adjacent cliff. Third, that he participated in rolling the victim off the cliff and dragged him to the bottom after he became stuck. Fourth, that he tied the victim to a third tree and struck him with a broken tree branch ten to fifteen times.

Although the prosecutor did not attribute a witness source for these claims, a review of the discovery materials makes it clear that the factual recitation is quite similar to a police interview given by Scott Royal in September of 1991. The trial court was never informed on the record of the numerous problems with Scott Royal, including his plea bargain to manslaughter, which was signed on October 10, 1991. Scott Royal gave earlier inconsistent statements. In addition, Scott Royal was subsequently charged with a very similar attack.

Stephen Rose, a codefendant, signed an affidavit in June of 1994 detailing Mr. David's lack of participation and naming Scott Royal as the main actor, an accusation that has significant force given Royal's subsequent involvement in a similar incident.

The other main witness in the case, Kathleen McAuliffe, also gave various stories after being immunized. The trial court was not told on the record that in her previous statements she

claimed not to have seen the cliff or the tree incidents. She did, however, at her deposition taken in connection with the criminal case on April 10, 1991, make several assertions that contradicted the statement of facts given in the trial court at the change of plea hearing.

REASONS WHY THE WRIT SHOULD BE GRANTED

As the First Circuit acknowledged (App., *infra*, A11), its decision in this case is at odds with the statements of courts of appeals in other circuits. This disagreement is likely to cause considerable inconsistency in how district courts in different circuits treat habeas corpus petitions. Indeed, while a district court in the First Circuit, following the precedent set by the decision in this case, would be precluded from recognizing an actual-innocence exception to 28 U.S.C. § 2244(d)(1)'s one-year period of limitation, at least one district court in another circuit has recognized such an exception and refused to dismiss a habeas corpus petition filed outside the one-year period of limitation because the petitioner had made a showing of actual innocence. *Nickerson v. Roe*, 2000 WL 33381022 at *1 (N.D.Cal. 2000). Furthermore, the issue of the availability of habeas corpus review to prisoners who can make a showing of actual innocence is important.

A. The Court of Appeals' Decision Is at Odds with Decisions of Courts of Appeals in Other Circuits

The First Circuit recognized that its position that there is no actual-innocence exception to the one-year time limit for filing habeas corpus petitions conflicted with positions expressed by other courts and cited, as an example, the Eleventh Circuit's decision in *Wyzykowski v. Dept of Corrections*, 226 F.3d 1213 (11th Cir. 2000). App., *infra*, A11. In *Wyzkowski*, the Court refused to answer conclusively whether the Suspension Clause requires an exception for actual innocence because the petitioner had not made an adequate showing, but it recognized that the petitioner's contention raised "a troubling and difficult constitutional question. . . . The question raises concerns because of the inherent injustice that results from the

conviction of the innocent and the technological advances that can provide compelling evidence of a person's innocence." 226 F.3d at 1218. Following the decision in this case, district courts in the First Circuit are free to ignore this troubling constitutional question and can simply dismiss untimely habeas corpus petitions without even considering petitioners' claims of actual innocence—no matter how strong those claims are.

The First Circuit's decision is even more directly in conflict with the Tenth Circuit's decision in *Gibson v. Klinger*, 232 F.3d 799(10th Cir. 2000). In that case, the Court stated, in no uncertain terms, that "AEDPA's one-year statute of limitations is subject to equitable tolling . . . when a prisoner is actually innocent." *Id.* at 808, citations omitted. The decision in this case is also at odds with the Ninth Circuit's decision in *Majoy v. Roe*, 296 F.3d 770 (9th Cir. 2002). There, the Court postponed deciding the issue but remanded the case to the district court, ordering that court to determine whether the petitioner could establish a colorable claim of actual innocence. *Id.* at 777-778.

The only court of appeals to agree, in explicit terms, with the First Circuit's position is the Eight Circuit, which, in *Flanders v. Graves*, 299 F.3d 974, 977 (8th Cir. 2002), stated that "[t]o allow an assertion of actual innocence to excuse the running of the statute in such circumstances would take the equitable-tolling doctrine far from its original and legitimate rationale." The only circumstances under which the Eight Circuit would allow for an exception to the one-year limit is where the petitioner can prove that "some action or inaction on the part of the respondent prevented him from discovering the relevant facts in a timely fashion, or, at the very least, that a reasonably diligent petitioner could not have discovered these facts in time to file within the period of limitations." *Id.* at 978.

This conflict between the circuits is likely to create considerable confusion and inconsistency in the district courts. District courts in the First and Eighth Circuits are directed to dismiss habeas corpus petitions filed outside the one-year time limit, ignoring even the strongest claims of actual innocence. In fact, one district court in the Sixth Circuit, which has not

directly addressed the issue, did just that. *Brown v. McKee*, 232 F.Supp.2d 761 (E.D.Mich. 2002). Citing *Flanders*, that court refused to consider the petitioner's claim of actual innocence and dismissed the habeas corpus petition because it was filed outside the one-year period of limitations. *Id.* at 768-69.

At the same time, petitioners filing habeas corpus petitions in other circuits will have access to habeas corpus review, despite failing to comply with the one-year time limit, if they can establish a colorable claim of actual innocence. In fact, at least one district court has declined to dismiss a habeas corpus petition because the petitioner made out a claim of actual innocence, *Nickerson v. Roe*, 2000 WL 33381022 at *1 (N.D.Cal. 2000), and other district courts have worked on the assumption that an actual-innocence exception does exist. *E.g. Thomas v. Welborn*, 2000 U.S. Dist. LEXIS 17974, at 9 (N.D. Ill.) (assuming that a colorable showing of actual innocence would overcome statute of limitations); *U.S. v. Zuno-Arce*, 25 F.Supp. 2d 1087, 1102 (C.D. Cal. 1998) (considering petitioner's claim of actual innocence after "hold[ing] that to foreclose a claim of constitutional violation where there has been a colorable showing of factual innocence would likely constitute a due process violation or an improper suspension of habeas corpus relief"); *Alexander v. Keane*, 991 F.Supp. 329, 334-339 (S.D.N.Y. 1998) (assuming, without deciding, that a showing of actual innocence would overcome AEDPA's statute of limitations).

This case provides an opportunity to bring clarity to this issue and consistency to the lower courts. Therefore, the Court should grant certiorari.

B. The Questions Presented are Important

DNA testing has led to the exoneration of at least 123 wrongly convicted people in the United States. Barry C. Sheck and Sarah L. Tofte, Gideon's Promise and the Innocent Defendant, Champion (January/February 2003). At the present time, however, DNA testing is only available in a very small number of cases—essentially, just in rape and rape-murder cases. *See* Geoffrey Christopher Rapp, DNA's Dark Side, 110

Yale L.J. 163, 167 (2000). So, while DNA testing has revealed a very real problem with the conviction of the innocent, the true scope of the problem remains unknown.

Prisoners who can make a showing of actual innocence should be given the opportunity to have their substantive constitutional claims considered on habeas corpus review. This Court has recognized this principle on more than one occasion. *Herrera v. Collins*, 506 U.S. 390, 404 (1993) ("In a series of cases culminating with *Sawyer v. Whitley*, 505 U.S. 333 (1992) . . ., we have held that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence."). These cases have been decided under the Court's miscarriage-of-justice doctrine, which establishes that habeas corpus petitioners' procedural defaults may be excused if they can demonstrate "that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). The exception created by this doctrine is a narrow one, but it clearly extends to cases where the petitioner can make a colorable claim of actual innocence. *See Schlup v. Delo*, 513 U.S. 298,324-25 (1995) ("[T]he quintessential miscarriage of justice is the execution of a person who is entirely innocent."). As this line of cases makes clear, the issue raised by this case is an important one.

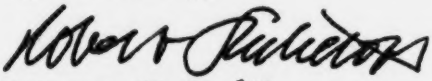
The court of appeals' decision in this case precludes habeas corpus review for petitioners who fail to meet the one-year period of limitation, even if they can make a colorable showing of actual innocence. This decision implicates the most fundamental values of our system of criminal justice. Considering the large number of recent cases where DNA testing has exonerated innocent people, including individuals on death row, *see* Barry C. Scheck, Preventing the Execution of the Innocent: Testimony before the Senate Judiciary Committee, 29 Hofstra L.Rev. 1165 (2001), the issue raised by this case is particularly important at the present time.

Because the questions raised by this case are fundamentally important, the Court should grant the petition.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
By his attorney,



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